Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:LAD:LA:TL-N-880-00
KHAnkeny

date: April 5, 2000

to: [redacted] Case Coordinator
[redacted] Revenue Agent

from: District Counsel, Los Angeles District, Los Angeles

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subject: **Extending the Period of Limitations for [redacted] and [redacted]**

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

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ISSUES

(1) For the [redacted] and [redacted] tax years, which entity is the proper party to sign the Forms 872 for [redacted] and its subsidiaries?

(2) For the [redacted], [redacted], [redacted], and [redacted] tax years, which entity is the proper party to sign the Forms 872 for [redacted] and its subsidiaries?

(3) Which address should be used on those Forms 872?

(4) What language should be added to the Forms 872 to cover partnership items?

CONCLUSIONS

(1) For the [redacted] and [redacted] tax years, [redacted] should sign the Forms 872 for the [redacted] consolidated group.

(2) For the [redacted], [redacted], [redacted], and [redacted] tax years, [redacted] should sign the Forms 872 for the [redacted] consolidated group.

(3) Examination should use the current address of [redacted] on its Forms 872 and the current address of [redacted] on its Forms 872.

(4) The paragraph proposed by Examination to cover partnership items should be added to the Forms 872.

FACTS

The [redacted] Acquisition by [redacted] of [redacted]

On [redacted], [redacted] acquired [redacted] as a wholly-owned, direct subsidiary of [redacted] (the [redacted] acquisition). We base this characterization of the acquisition on the following taxpayer's statements and SEC filing.

In his [redacted] memorandum to Examination, [redacted] of [redacted] and [redacted] described the [redacted] acquisition as follows:

> On [redacted] the [redacted] consolidated group acquired all of the stock of [redacted] and its subsidiary, [redacted] and [redacted]. Prior to this transaction, the following transactions occurred:
>
> 1. On [redacted], the former common parent of the consolidated group, was merged downstream (§368((1)(A)&(D)) into [redacted] a California corporation (Old [redacted], and
>
> 2. On [redacted], Old [redacted] was merged into [redacted], a Delaware corporation, (New [redacted]) in a reincorporation transaction (§369(a)(1)(A) & §368(a)(1)(F)).
>
> The acquisition of [redacted] was accomplished as follows:
>
> 1. New [redacted] (the new [redacted] group common parent) acquired [redacted] shares of the [redacted] outstanding shares of [redacted] in exchange for $[redacted] cash and $[redacted] seller debentures,
>
> 2. New [redacted] subsequently contributed these shares to its wholly-owned subsidiary, [redacted] (§351); and
>
> 3. [redacted] merged with and into [redacted] with the remaining shareholders of [redacted] received $[redacted] cash in redemption of their stock (§368(a)(1)(A) & §302). The source of the $[redacted] in cash was debt incurred by [redacted] in connection with the transaction.
>
> Subsequent to the acquisition of [redacted] as described above, [redacted] liquidated into [redacted] in a §332 transaction and [redacted] changed its name to [redacted] (§368(a)(1)(F)). [redacted]

[redacted]'s description is consistent with the description of the acquisition provided in [redacted]'s [redacted] Notice to Shareholders:

[redacted]

(This document, which was provided by Examination, is printed in ACII and is difficult to decipher. We refer to the handwritten pagination on the bottom of each page.)

The [redacted] acquisition of [redacted] by [redacted]

On [redacted], [redacted] acquired [redacted] as a wholly-owned, direct subsidiary of [redacted] (the [redacted] acquisition). In corporate tax parlance, this appears to have been a "reverse triangular merger." I.R.C. § 368(a)(2)(E). We based this characterization on the following SEC filing.

The Notice of Special Meeting of Stockholders on [redacted] stated that the stockholders would be asked:

[redacted]

[redacted]

* * * * * * *

Consequently, as a result of the [redacted], [redacted] will become a wholly owned direct subsidiary of [redacted], and the holders of [redacted] Stock will become holders of [redacted] Common Stock. [redacted].

The Board of Directors anticipated that [redacted] stockholders would receive [redacted]% or [redacted]% of the [redacted] stock, depending on whether the [redacted] merger also took place. Similarly, it anticipated that the [redacted] stockholders would hold [redacted]% or [redacted]% of the [redacted] stock. [redacted].

According to the [redacted] Amendment No. [redacted] to [redacted]'s Registration Statement, in [redacted], [redacted] did acquire [redacted] and [redacted]. [redacted].

The [redacted] acquisition of [redacted] by [redacted]

According to the [redacted] Amendment No. [redacted] to [redacted]'s Registration Statement, the Boards of Directors of [redacted] and [redacted] agreed that [redacted] would become a wholly-owned, direct subsidiary of [redacted] (the [redacted] acquisition):

[redacted]

[redacted]

The [redacted] acquisition also appears to have been a reverse triangular merger. I.R.C. § 368(a)(2)(E).

In her [redacted] memorandum to Counsel, Ms. Le stated that the [redacted] acquisition occurred in [redacted].

Additional Information

On [redacted] Ms. Le telephoned the Delaware Secretary of State. She confirmed that [redacted] and [redacted], both of which were incorporated in Delaware, are still active and in good standing.

Proposed Forms 872

[redacted] filed consolidated corporate income tax returns for its consolidated group's [redacted] and [redacted] tax years. [redacted] filed consolidated corporate income returns for its consolidated group's [redacted], [redacted], [redacted], and [redacted] tax years.

Examination asked us whether it could use the following description for the signatory on the Forms 872 for [redacted]:

> [redacted], as successor in interest to [redacted], as successor in interest to [redacted], as successor in interest to [redacted] (A.K.A.: [redacted])

Ms. Le explained to Ms. Ankeny that Examination would prefer to have a separate Form 872 for each tax year, [redacted] and [redacted] although separate forms are unnecessary.

Examination also asked whether it could use the following description for the signatory on the Forms 872 for [redacted]:

> [redacted], as successor in interest to [redacted], as successor in interest to [redacted]

Examination also proposed adding the following paragraph to each Form 872 to cover partnership items:

> Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b) but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

DISCUSSION

(1) For the [redacted] and [redacted] tax years, [redacted] should sign the Forms 872 for the [redacted] consolidated group.

Generally, the common parent is the exclusive agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Id. Thus, generally the common parent is the proper party to sign Forms 872 for all members of the group. Id. Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.

Temp. Reg. § 1.1502-77T, which was promulgated in 1988 to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). When a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group for purposes of mailing notices of deficiency and for executing waivers of the period of limitations. Under Temp. Reg. § 1.1502-77T(a)(4), any one or more of the following corporations may act as alternative agents for the group:

> (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
>
> (ii) A successor to the former common parent in a transaction to which § 381(a) applies,
>
> (iii) The agent designated by the group under section 1.1502-77(d), or
>
> (iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Temp. Reg. § 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. § 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. § 1.1502-77T.

The issue is which entity is the proper party to extend the period of limitations for the [redacted] consolidated group's [redacted] and [redacted] tax years. Temp. Reg. § 1.1502-77T applies. After the [redacted] acquisition, [redacted] the common parent of the consolidated group, ceased to be the common parent. Examination seeks to extend the period of limitations for taxable years for which the due dates for filing of the consolidated returns were after September 7, 1988.

Temp. Reg. § 1.1502-77T(a)(4)(i) provides that the common parent of the group for all or any part of the year to which the notice or waiver applies is an alternative agent. [redacted] was the common parent of the consolidated group for the group's [redacted] tax year and its short [redacted] tax year. [redacted] still exists, even though it has changed its name from [redacted] to [redacted] Therefore, [redacted] as an alternative agent, is the proper party to execute the Forms 872.

The other subparagraphs of Temp. Reg. § 1.1502-77T(a)(4) are inapplicable. Subparagraph (ii) provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381(a)(2) concerns a transfer in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1). Subparagraph (ii) is inapplicable because [redacted] survived the acquisitions and has no successor. The [redacted] acquisition was not a section 368 reorganization because the [redacted] stockholders received cash and debt, not stock. The [redacted] and [redacted] acquisitions appear to have been reverse triangular mergers under section 368(a)(2)(E).

Subparagraph (iii) provides that the agent designated by the group under Treas. Reg. § 1.1502-77(d) is an alternative agent. It is inapplicable because [redacted] has not dissolved or contemplated dissolution, contrary to the requirement of Treas. Reg. § 1.1502-77(d).

Finally, under subparagraph (iv), if under Treas. Reg. § 1.1502-75(d)(2) or (3) the group remains in existence following a mere change in identity, a transfer of assets to a subsidiary, or a reverse acquisition, then the common parent of the group at the time the waiver is given is an alternative agent.

[redacted] did change its name to [redacted] under section 368(a)(1)(F). But, Temp. Reg. § 1.1502-77T(a)(4)(iv) is inapplicable because the [redacted] consolidated group did not remain in existence. After the [redacted] acquisition, [redacted]

became the common parent. After the [redacted] acquisition, [redacted] became the common parent. After the [redacted] acquisition, [redacted] became and continues to be the common parent.

Nor did [redacted] transfer its assets to a subsidiary under Treas. Reg. § 1.1502-75(d)(2)(ii).

In addition, none of the acquisitions was a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3). A reverse acquisition would mean for example that, in exchange for their [redacted] stock, the [redacted] stockholders received more than [redacted]% of the [redacted] stock in the [redacted] acquisition. In fact, the [redacted] stockholders received cash and debt, not [redacted] stock. Nor were the [redacted] and [redacted] acquisitions reverse acquisitions. As a result of the [redacted] acquisition, the [redacted] stockholders received only [redacted]% of the [redacted] stock. As a result of the [redacted] acquisition, the [redacted] stockholders received only [redacted]% of the [redacted] stock.

In summary, [redacted] is an "alternative agent" under subparagraph (i) of Temp. Reg. § 1.1502-77T(a)(4). Therefore, [redacted] should sign the Forms 872 for tax years [redacted] and [redacted].

The taxpayer should be identified as:

[redacted]
(E.I.N.: [redacted])*

* With respect to the consolidated income tax liability of [redacted] (f/k/a [redacted]) affiliated group for the tax year ending [list tax year]. [redacted] is an alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(4)(i).

The name of the taxpayer should be stated on each Form 872 exactly as it appears on the corresponding return. In the case of the return for [redacted], the name is "[redacted]." The draft Form 872 stated that the taxpayer was "[redacted]."

The signature block on the second page of the Form 872 should read:

CORPORATE NAME [redacted] (E.I.N. [redacted])
(f/k/a [redacted]
(E.I.N. [redacted])

The Forms 872 should be signed by a current, duly authorized officer of [redacted] I.R.C. §§ 6061(a), 6062; Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. After the signature line, the name of the signatory and his title should be typed in.

Finally, there are certain documents that Examination should obtain to insure the validity of each Form 872. Since a current officer of the signatory must execute each Form 872, Examination should also review each signatory's latest bylaws and most recent corporate minutes to determine the identity of the signatory's current officers.

(2) For the [redacted], [redacted], [redacted], and [redacted] tax years, [redacted] should sign the Forms 872 for the [redacted] consolidated group.

The analysis of the [redacted] Forms 872 tracks the analysis of the [redacted] Forms 872. [redacted] was the common parent of [redacted] consolidated group for the group's [redacted], [redacted], [redacted], and [redacted] tax years. [redacted] still exists. Therefore, [redacted], as an alternative agent, is the proper party to execute the Forms 872. Temp. Reg. § 1.1502-77T(a)(4)(i).

The taxpayer should be identified as:

[redacted]
(E.I.N.: [redacted])*

* With respect to the consolidated income tax liability of [redacted] (E.I.N.: [redacted]) affiliated group for the tax year ending [list tax year]. [redacted] is an alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(4)(i).

The signature block on the second page of the Form 872 should read:

CORPORATE NAME [redacted]
(E.I.N.: [redacted])

(3) Examination should use the current address of [redacted] on its Forms 872 and the current address of [redacted] on its Forms 872.

Examination asked whether to use the address listed on the taxpayers' income tax returns, the address reflected on the IDRS records for the taxpayers, or [redacted]'s address.

The [redacted] Forms 872 should list the current address of [redacted]. Similarly, the [redacted] Forms 872 should list the current address of [redacted]. If the addresses stated in our records are not their current addresses, our records should be updated.

Forms 872 differ from notices of deficiency. Section 6501(c)(4) does not require that a Form 872 list the address provided in the records of the Service. Failing to list a last known address could not invalidate a Form 872. In contrast for example, section 6212(b)(1) does require that the Service mail a notice of deficiency to a taxpayer's last known address. Then, if the taxpayer did not receive the notice of deficiency, the notice would still be valid.

(4) The paragraph proposed by Examination to cover partnership items should be added to the Forms 872.

Examination also proposed adding the previously-quoted paragraph covering partnership items to the Forms 872. Each taxpayer, as the common parent, files a Form 872 on behalf of all of its wholly-owned subsidiaries, including those subsidiaries that are partners in partnerships. This is because each partner may enter into an agreement to extend the period of limitations with respect to that partner. I.R.C. § 6229(b)(1)(A); Treas. Reg. § 1.1502-77(a). Because Form 872 does not expressly cover partnership items, we agree that Examination should add the paragraph it proposed.

In accordance with CCDM(35)3(19)4, we are furnishing a copy of this advisory opinion applying well-settled principles of law to the Assistant Chief Counsel (Field Service) for 10-day, post-issuance review. We will let you know whether the Assistant Chief Counsel agrees with this advise.

Please call Ms. Ankeny at 213-894-3027, ext. 155, if you have any questions.

JAMES A. NELSON
District Counsel

By: _____
KATHERINE H. ANKENY
Attorney

cc: [redacted], Case Manager for the prior cycle